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IN THE

Supreme Court of the United States

October Term, 1949

No. 985

WARREN W. DUNNELL,

Petitioner,

vs.

SAFEWAY STORES, INC., a corporation,

Respondent.

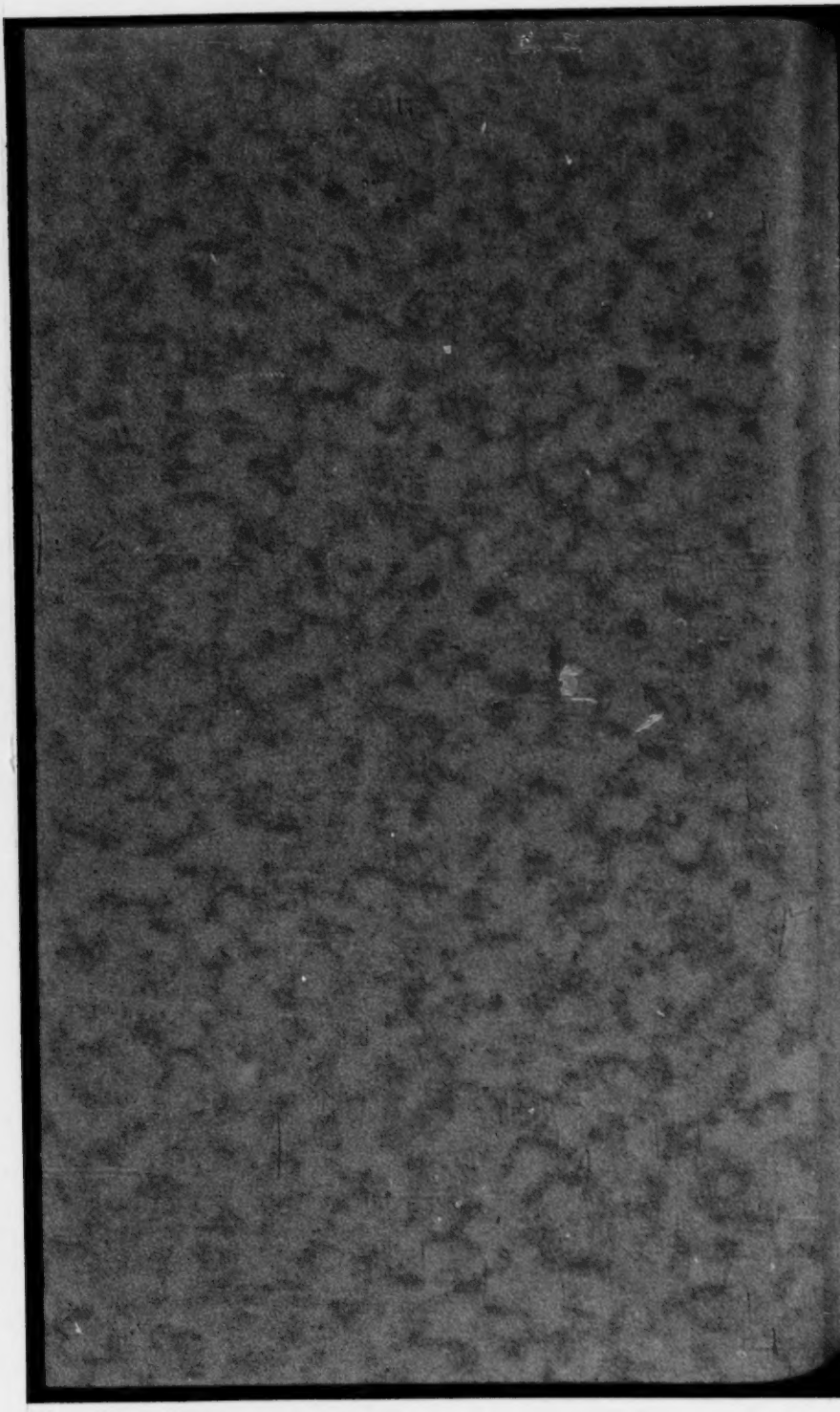
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

WESTALL AND WESTALL,
JOSEPH F. WESTALL,
EDWARD F. WESTALL,
608 South Hill Street,
Los Angeles 14, California,

EMORY L. GROFF,
McLachlen Building,
700 Tenth Street,
Washington, D. C.,

Attorneys for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.



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Summary and Short Statement of Matter Involved (Rule 38, Subdivision 2 of This Court).

To the Honorable, the Supreme Court of the United States:

The following is an outline of the most pertinent facts. The pertinence of these facts are fully set forth and considered in our accompanying brief, hence, for present purposes, we make scanty references to the record, and only where it appears necessary for full preliminary understanding, quoting a few authorities for the same purpose.

Your petitioner, as applicant, filed in 1942, application for registration, Under Sec. 6 of the Trade-Mark Act of

1905, U. S. Code, Title 15, §81 of the trade-mark as applied to tissue paper toilet seat covers.

These proceedings are based upon the fact that in 1944, during the pendency of Dunnell's said application for registration, present respondent opposer, Safeway Stores, Inc., filed in the Patent Office, a Notice of Opposition to Dunnell's registration of said trade-mark. It was not contended in said Notice of Opposition (and it could not be so contended under the law) that Dunnell did not have complete TITLE to his said trade-mark: Said opposition was said in opposer's brief to have been filed under the authority of the Trade-Mark Act of 1905, Title 15, §85—which, incidentally, as shown in our accompanying brief, we contend is inapplicable.

As the corporate name of respondent in this proceeding contains the words "Safe Way" the Court may get a preliminary impression that in adopting said trade-mark, Dunnell was leaning on a good reputation of Safeway Stores, Inc. We desire to guard against the Court getting any such preliminary impression, hence the following:

While in said oposition (filed 1944), Safeway Stores, Inc., stated that they owned 2300 stores scattered throughout the United States, at the time of the first adoption and use of Dunnell's said trade-mark there was only a comparatively very few of such stores in California and the evidence later to be considered in our brief will show that Dunnell at that time had not noticed them. Dunnell's testimony

on this point is very credible, as there seems to have been no reason why he should have been interested.

That Dunnell was not leaning on any reputation Safeway Stores in the adoption and acquirement of Title by adoption and use of his said trade-mark

is further attested by the circumstance that the name "Safeway" as applied to grocery stores is meaningless, in that such stores sell all popular brands of products, such as Heinz 57 Varieties, those of National Biscuit Company, and Campbell's Soup, as well as many other things. As will be later shown in our brief, Dunnell adopted the name "Safe Way" but did so because as applied to toilet seat covers it was suggestive that for sanitary purposes it was desirable to proceed in the safe way—by using toilet seat covers. At the time Dunnell first adopted and used the trade-mark in 1933

present opposer was only a stockholder in a comparatively few stores, with no more authority than any other stockholder to institute proceedings of any kind in the name of the corporation. Present opposer did not become the owner of its said 2300 stores until shortly before the filing of Dunnell's application for registration and after he had used it without the slightest confusion or protest from any one for over 10 years, it being admitted by Safeway Stores, Inc., that neither opposer nor any of its subsidiary corporations of which it owned stock or of which it afterwards, at the end of 1942 (1941 as to a single one of them), ever had a single call for toilet seat covers; nor had opposer or any of its subsidiaries ever manufactured, caused to be

manufactured, approved for sale, or offered for sale even a single toilet seat cover under the trade-mark "Safeway" or under any other name or at all; while Dunnell from the time of his first adoption and use of said trade-mark

to the time of filing said opposition sold and distributed over 73½ million of said seat covers under said trade-mark—as shown in Dunnell's Exhibit Q.

Such extensive distribution of toilet seat covers by Dunnell was without the slightest protest or objection of any kind on the part of respondent herein; and there is not the slightest evidence of any confusion in the record as to the fact that the manufacturer and distributor of said covers was Dunnell under his registered fictitious name Sani-Gard Company; on the contrary, opposer *expressly acquiesced* in Dunnell's use of the name by ordering from one of Dunnell's jobbers, and had personally installed by Dunnell in the rest room of one of its subsidiaries Dunnell's "Safe-Way" covers, in Dunnell's "Safe-Way" cabinets (which Dunnell personally installed), after which Dunnell continued to sell many hundreds of thousands of said seat covers throughout the length and breadth of the land as well as in foreign countries.

We also, fully in the accompanying brief, show that respondent herein, Safeway Stores, had full knowledge of Dunnell's use of said trade-mark over 2 years before the filing of Notice of Opposition, in that, at the time last referred to, it ordered from one of Dunnell's jobbers 6 or 7 of Dunnell's Safe-Way cabinets and seat covers, installed in a rest room of one of its subsidiaries which Dunnell personally installed in the rest room, with not the

slightest suggestion on the part of Safeway Stores, Inc., that he had not a perfect right so to do.

Dunnell only had notice that Safeway Stores, Inc., objected to said registration of said mark when it filed its Notice of Opposition as before stated, over 2 years afterwards as will be later shown.

That Dunnell always had advertised his said seat covers under said trade-mark in advertising mediums not reasonably accessible to grocery store customers, but only in mediums accessible to his special class of customers, such as newspaper offices, transportation terminals, service stations, and so forth, who distributed said covers *gratis* to users of their toilet facilities, and always only advertised them under his fictitious name Sani-Gard Company, is clearly proven and not denied.

It is clearly admitted, as we show in our brief, that Dunnell was exceedingly ethical in all his dealings with his special class of customers (not grocery store customers).

In concluding this branch of our preliminary explanation we earnestly suggest that the Court does not permit itself to be prejudiced by any idea that because Safeway Stores opposed Dunnell's registration that there is any merit whatsoever in any such opposition.

Hoping that this statement will not violate the rule as to brevity, but for the sake of completeness:

Dunnell's said application for registration was examined and passed for publication in compliance with Section 6 of the Trade-Mark Act of 1905 (all pertinent statutes are set forth in the appendix of this petition). Present respondent, Safeway Stores, Inc., filed a Notice of Opposition to said registration. Times for testimony

of the respective parties were determined, and the date of hearing set for December 20, 1944. The Patent Office decided that Opposer was not entitled to the registration requested, whereupon, your petitioner, applicant Dunnell—having an option under Title 35, §63, U. S. Code which is made applicable to trade-marks by Title 15, §89, U. S. Code, construed both before and after its enactment as applying to trade-marks as well as patents, to either appeal to the Court of Customs and Patent Appeals, or to file an action requiring a trial *de novo* (latter part of Title 35, §63, U. S. Code) in the appropriate District Court, elected to file such action.

The answer of Safeway Stores, Inc., including a counterclaim for an injunction against Dunnell prohibiting him from the use of his trade-mark, was thereafter in due time, filed, and plaintiff Dunnell replied to such answer and counterclaim.

The case being then at issue came on for trial before the Honorable Louis E. Goodman, United States District Judge at San Francisco, California. During such trial, *de novo* plaintiff Dunnell put in evidence not only the evidence before the Patent Office but new and additional evidence permitted on trial *de novo*.

After the trial before Judge Goodman, the case was submitted for the decision of said District Judge, defendant therein, Safeway Stores, Inc., to have 30 days to file an Opening Brief; plaintiff Dunnell to have 35 days thereafter to file answer; and defendant Safeway Stores, Inc., to have 10 days to reply to plaintiff's answer.

District Judge Goodman rendered his decision on May 15, 1947, signed and entered Findings of Fact and Conclusions of Law, and entered judgment on June 18, 1947, wholly in favor of your petitioner, dismissing said counter-

claim for want of jurisdiction (such want of jurisdiction having been argued before the trial court), and authorizing the Commissioner of Patents to grant Dunnell's request for registration.

Thereafter, on December 15, 1947, defendant Safeway Stores, Inc., served and filed its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, and record was thereafter duly prepared, filed and docketed, with the Clerk of said United States Court of Appeals.

The merits of the appeal came on for hearing before said Court of Appeals on July 5, 1948.

On January 11, 1949, the Court of Appeals, Denman, Chief Judge, and Healy and Bone, Circuit Judges, rendered its decision. The majority of said Court namely Judge Denman and Judge Bone decided adverse to applicant Dunnell; but Judge Healy rendered a strong dissenting opinion; so that Trial Court Judge Goodman, and Circuit Judge Healy decided that Dunnell was entitled to the relief prayed in his complaint, Judges Denman and Bone deciding that he was not entitled to relief.

The majority of the Court of Appeals also sustained appellee's (Safeway Stores', Inc.) counterclaim and entered judgment to the effect that Dunnell should be prohibited by injunction from use of his said trade-mark (without support of any law).

We are now stating the bald facts, arguments and authorities relating to such facts with references to the record on all pertinent points being contained in the accompanying brief.

Statement (Rule 38, Subdivision 2 of This Court) Particularly Disclosing the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment or Decree in Question.

The jurisdiction of the District Court before which this case was originally tried and that of the Court of Appeals for the Ninth Circuit (upon which the jurisdiction of this Court is based) depends upon the fact that the cause of action arises under the trade-mark laws of the United States, and particularly as set forth in §4915 R. S. U. S., United States Code, Title 35, §63 (applying particularly to patents), and Title 15, §89 construed before and after its enactment as making §4915 R. S. U. S. applicable to trade-mark application proceedings, and annotations, Federal Code Annotated, under Title 15, §89, page 736.

Copies of all code sections just referred to are set forth in the appendix of this petition.

Under this heading, we call the Court's attention to Title 15, §98 of the U. S. Code, which, being short, can be here quoted:

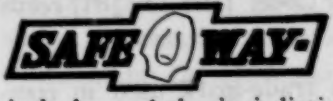
> "98. Review by Supreme Court.—Writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this Act [subchapter] in the same manner as provided for patent cases by the Act creating the circuit court of appeals [28:347]. (Feb. 20, 1905, c. 592, 18, 33 Stat. 729.)"
>
> (Also set forth for completeness in classified appendix of this petition.)

Under Supreme Court Rule 38, Subdivision 5(a): The said Court of Appeals has decided a Federal question of substance in a way (not probably, but surely) not in accord with applicable decisions of this Court; in that said Court of Appeals has directed in its opinion of January 11, 1949 [Tr. 404], that "Stores is entitled to an injunction against Dunnell's use of the words 'Safe-Way-' or 'Safe-Way' or 'Safe Way' without the hyphen." (Judge Healy dissenting.)

There is no law whatsoever authorizing any such injunction; the law is entirely to the contrary as fully shown in our accompanying brief.

Under Rule 38, Subdivision 5(b): The majority opinion of the Court of Appeals has decided an important question, of local law in a way—not only probably—but surely—in conflict with applicable local decisions (as well as express statutory enactments of the State of California).

This is one of the first of the matters which urgently call for decision of this Court on certiorari; in that said Court of Appeals has directed the issuance of an injunction prohibiting Dunnell from using his trade-mark



; and such decision was entirely beyond the jurisdiction of said Court of Appeals as TITLE of Dunnel in his said trade-mark is invested in him by the common law in force in every state of the Union, and particularly within the jurisdiction of the District Court and Court of Appeals in California. Thus,

the California statute (Business and Profession Code of California) §14400, reads as follows:

> "§14400. Ownership. Any person who has adopted and used a trade-mark either within or beyond the limits of this state, is its original owner."

Dunnell DID adopt and use his trade-mark SAFE-O-WAY and is therefore its OWNER and entitled to all rights and privileges of ownership in this state. (Conclusion V of trial court [Tr. 47].) It is, perhaps, irrelevant to state that appellee Dunnell has his trade-mark SAFE-O-WAY, as applied to seat covers, registered not only in California, but in many states: But, IT IS PERTINENT to say, that the law of California as above quoted is distinctly that he has a property right in his trade-mark whether first adopted and used in any other state or in this state, AND WHETHER REGISTERED OR NOT.

Further, as showing that said Court had no power to direct the issuance of such injunction: The trade-mark Act upon which Dunnell based his application for Federal registration, *i. e.*, United States Code, Title 15, §81, reads so far as pertinent as follows:

> "That the OWNER of a trade-mark used in commerce with foreign nations or among the several states or with Indian tribes * * * may obtain registration for such trade-mark by complying with the following requirements * * *" (caps ours) (with all of which, it will later be seen, Dunnell did comply—and, as we more fully show in the accom-

panying brief, most extensively and continuously used said trade-mark throughout the United States and foreign countries).

Dunnell became the OWNER by adoption and use—and manifestly registration is not necessary to in any way continue or assure such ownership.

Again, we urge there is no authority whatsoever for the majority of the Court of Appeals to direct an injunction prohibiting Dunnell from the use of said trade-mark, TITLE being unquestioned and unquestionable in any of the prior proceedings in the Patent Office or Courts between the parties to this proceeding.

Further, under Rule 38, Subdivision 5(b) of this Court, the majority opinion of said Court of Appeals, ignoring that the trial of the District Court was *de novo,* under overwhelming weight of authorities (which has not been questioned in any prior proceedings in this matter), and that the District Court so found and concluded [Conclusion III, Tr. 47] declined and refused to consider the Trial Court's findings and conclusions as in any way binding upon it (although supported by the clearest and most conclusive of evidence, clear admissions, and inescapable inferences, as we fully show in the accompanying brief), treating the proceeding as an *appeal* [see particularly Tr. 395, 396 and 397] from the Patent Office decisions and basing its decision on said Patent Office findings; notwithstanding the elementary law, as stated, for instance, in the case of *Globe-Union Chicago Telephone Supply Company* (C. C. A. 7th), 41 U. S. P. Q. 366 of said opinion, page 375:

> "There is only one more contention by counsel that requires our consideration. Counsel contends that 'Findings of Fact by a trial court so far as there

is any testimony consistent therewith, must be treated as unassailable' [citing cases]. We are not forgetful of the rule, announced in these cases, that compels our acceptance of the trial court's findings, when it is predicated on conflicting testimony, of witnesses testifying in the trial court, and where credibility is largely determined by personal observation of the trial judge * * *."

Still under Rule 38, Subdivision 5(b): The majority opinion of the Court of Appeals decided a federal question in a way—not probably, but certainly—in conflict with applicable decisions of this Court; in that in said majority opinion, said Court has declined and refused, particularly upon Petition for Rehearing and in its decision rendered February 24, 1949 [Tr. 419-420] thereon (although earnestly urged to do so), to pass upon the issue as to whether to sustain Safeway Stores, Inc., alleged counterclaim, it was necessary to allege (the parties being of the diverse citizenship) that the value of the matter in controversy should be $3,000.00, exclusive of interest and costs. This matter was strongly pressed upon the attention of the Court of Appeals in our Petition for Rehearing (not in this record), where we stated:

"The basis in the pleading of appellant Safeway Stores, is in Paragraph 1 of its counterclaim [Tr. 18] which reads:

'1. Counterclaimant, Safeway Stores, Incorporated, is a corporation organized under and by virtue of the laws of the State of Maryland, and is a citizen of the State. The matter in controversy exceeds the sum of Three Thousand Dollars [16] ($3,000.00) exclusive of interest and costs.'"

The immediately foregoing quoted jurisdictional pleading is denied by appellee Dunnell at Transcript 26, Paragraph V of his answer to said counterclaim, as follows:

> "In answer to paragraph 1 of said counterclaim, plaintiff admits that defendant, counterclaimant, is a corporation organized and existing under and by virtue of the laws of the state of Maryland, and is a citizen of said state; but denies that the matter in controversy in this suit exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, or any other sum whatsoever."

Thereafter, we fully argued the matter before said Court of Appeals, cited and quoted extensively from many cases including, particularly, a decision rendered July 20, 1936 by Circuit Judges of the Ninth Circuit, Wilbur, Denman and Matthews in the case entitled *Electro-Therapy Corporation v. Strong et al.*, reported 84 F. 2d 766; also citing and quoting from the *case of Wilderman v. Roth*, 9 F. 2d 637 (District Court for the Eastern District of Pennsylvania), all to the effect that while an allegation of $3,000.00, etc., in a pleading preliminarily seems to confer jurisdiction, it is necessary when shown on the trial that no such amount was involved, but a lesser amount, for the Court to dismiss any such complaint or counterclaim.

We also cited the following cases in which decisions are all to the same effect: *Teeters v. Henton*, 43 F. 2d 175; *Furmine v. West Jersey and Seashore R. Co.*, 44 F. 2d 614; *Miller v. First Service Corporation*, 84 F. 2d 680; *McNutt v. General Motors*, 298 U. S. 178; *McNutt v. McHenry, etc.*, 298 U. S. 190.

In its decision of February 24, 1949 [Tr. 419-420], on such Petition for Rehearing the first paragraph of the opinion [Tr. 419] reads:

> "Dunnell's petition for rehearing contends for the first time that Stores' counterclaim is not within the jurisdiction of the district court because, although the parties are of diverse citizenship, the issue raised as to the $3,000. value of the 'matter in controversy' was not supported by the evidence."

The Court's above statement to the effect that we contend *for the first time* that jurisdiction is lacking is mistaken. On the contrary, at Transcript 186, during the trial before Judge Goodman, we fully stated our argument relating to jurisdiction of the counterclaim and have continued to do so since; and the trial court in its judgment, paragraph III [Tr. 50] dismissed said counterclaim at counterclaimant's costs.

The said opinion then continues:

> "We do not agree that jurisdiction is lacking. Assuming, but not deciding, that the matter in controvery is not more than $3,000, the counterclaim arises out of the transactions and occurrences which are the subject matter of Dunnell's complaint."

We remind, also, in the Court's opinion decided January 11, 1949, said Court of Appeals FOUND AND DECIDED that the counterclaimant, Safeway Stores, Inc., in support of said counterclaim, HAD PROVEN NO DAMAGES WHATSOEVER, BUT HAD WAIVED DAMAGES.

Under Rule 38, Subdivision 5(a) and (b): The majority opinion of said Court of Appeals has decided a Federal question of substance in a way (surely, and not probably) not in accord with applicable decisions of this

Court; in that said majority opinion decided that Dunnell was not entitled to Federal registration of his said trade-mark, notwithstanding that there could be no damage whatsoever to respondent by such registration. No such damage was even remotely attempted to be proven. Admissions, on behalf of respondent that damage could not be proven, will be more fully considered in the accompanying brief.

In our brief, we will show that Dunnell complied with all laws authorizing registration—and the same perhaps sufficiently for present purposes—appears in preceding paragraphs under this heading.

Under Rule 38, Subdivision 5(a) and (b): The majority opinion of said Court of Appeals has decided a Federal question (not probably, but certainly) in a way in conflict with applicable decisions of this Court; and in the same connection, under Subdivision (b) has decided an important question of local law in a way (not probably, but surely) in conflict with applicable local decisions and by the same decision complained of has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision—all in that said majority opinion failed, neglected and refused to apply the elementary law, state and federal relating to laches and estoppel, particularly such laches and estoppel as relied upon in this case, as, with full knowledge and notice of Dunnell's claimed right to his use of his said trade-mark respondent herein (appellant before the Court of Appeals) Safeway Stores, Inc., acquiesced in Dunnell's use of said trade-mark.

Dunnell's conduct in use, advertising, and distributing his said product under said trade-mark, admittedly, has at all times, been exemplary all as fully shown in the accompanying brief.

Reasons for the Allowance of Writ, Under Rule 38 of This Court, Subdivision 2.

We have heretofore stated many, of what we believe to be compelling reasons, for the grant of this petition.

We now state one which we know comes from the heart of our client as this litigation has been extremely burdensome to him:

The dog in the manager of Aesop, although he could not eat hay himself, tried to prevent others from doing so. Likewise, respondent, who could not sell toilet seat covers to the trade in its stores, and who never sold toilet seat covers under any name whatsoever, who has clearly admitted that toilet seat covers were unsuitable for sale in any of its stores, and who does not even now indicate a desire to ever sell such product, seeks to injure petitioner's clearly established trade-mark right, the only and obvious purpose of such procedure being that respondent, at some future time, such as, for instance, after he (Dunnell) has sold another seventy-three and one-half million of his said product under the trade-mark, may be tempted to depart from the grocery business and to purloin Dunnell's valuable good will; and that for this tribunal to aid, countenance, foster or encourage any such fraudulent design is manifestly (to grossly understate) *outrageously inequitable*—all of which will be fully substantiated and justified in our accompanying brief.

ANOTHER IMPORTANT REASON FOR THIS APPLICATION FOR CERTIORARI IS THAT THE MAJORITY OPINION OF THE COURT OF APPEALS [Tr. 390], JUDGE HEALY VIGOROUSLY DISSENTING [Tr. 406], TOTALLY IGNORED VITALLY IMPORTANT, CONCLUSIVELY PROVEN, AND ADMITTED FACTS; AND FAILED AND REFUSED TO APPLY ALL OR ANY PERTINENT ELEMENTARY LAW TO SUCH FACTS.

Prayer for the Issuance of Writ.

Petitioner, therefore, prays that certiorari be granted, and that the writ be issued, and that after grant, the order of said Court of Appeals directing the issuance of an injunction against the use by petitioner of his said trade-mark be reversed, and that the Court of Appeals be directed to enter an order authorizing the Commissioner of Patents to grant Dunnell's registration of his said trade-mark; and that such attorneys' fees as are allowed by law be authorized to be granted to petitioner; and such other, further or different relief, as may be meet, be granted by this Court.

Respectfully submitted,

WARREN W. DUNNELL,
Petitioner;

WESTALL AND WESTALL,
JOSEPH F. WESTALL,
EDWARD F. WESTALL,
608 South Hill Street,
Los Angeles 14, California,
By

Joseph F. Westall

EMORY L. GROFF,
McLachlen Building,
700 Tenth Street,
Washington, D. C.,
Attorneys for Petitioner.

Certificate of Counsel.

I, Joseph F. Westall, the attorney who tried the case in which the foregoing Petition for Certiorari is filed, and who prepared all briefs and made all arguments in the District Court and in the Court of Appeals for the Ninth Circuit to which appeal was taken, and who prepared the foregoing Petition for Certiorari, do hereby certify that in my judgment the foregoing Petition for Certiorari is well founded and that it is not interposed for delay.

By

Joseph F. Westall.

APPENDIX.

Appendix in Which Are Copied and Classified All Statutes Relating to the Nature and Scope of This Court's Jurisdiction, and, Incidentally, Those Relating to the Court of Appeals' Jurisdiction Upon Which This Court's Jurisdiction Is Partially Based.

The jurisdiction of the District Court before which this case was originally tried and of the Court of Appeals of the subject-matter thereof depends upon the fact that the cause of action arises under the trade-mark laws of the United States, and particularly as set forth in §4915 R. S. U. S., United States Code, Title 35 §63 (applying particularly to patents), and Title 15, §89, construed before and after its enactment as making §4915 R. S. U. S. applicable to trade-mark application proceedings, and annotations, Federal Code Annotated, under Title 15, §89, page 736.

Title 35, §63, United States Code, so far as pertinent reads:

> "63. Bill in equity to obtain patent.—Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, ac-

cording to law, to receive a patent for his invention, as specified in his claim for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant's filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law * * *."

Title 15, §89, United States Code reads as follows:

"89. Appeal from decision of Commissioner of Patents.—If an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or a party to an application for the cancellation of the registration of a trade-mark is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the United States Court of Customs and Patent Appeals on complying with the condition required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure, shall govern in every stage of such proceedings as far as the same may be applicable (Feb. 20, 1905, c. 592, §9, 33 Stat. 727).

Explanatory Note.—Act March 2, 1929, c. 488, §2(b), 45 Stat. 1476, substituted 'United States Court of Customs and Patent Appeals for Court of Appeals of the District of Columbia.'"

THAT THE TRIAL BEFORE THE DISTRICT COURT APPEALED FROM WAS DE NOVO IS SHOWN BY THE FOLLOWING PORTION OF SECTION 63, TITLE 35 OF THE UNITED STATES CODE, AND THE EVIDENCE BEFORE THE PATENT OFFICE AS WELL AS ADDITIONAL AND OTHER EVIDENCE MAY BE OFFERED ON SUCH DE NOVO TRIAL:

> "63. Bill in equity to obtain patent.—Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant [appeal not having been taken to the United States Court of Customs and Patent Appeals he] may have remedy by bill in equity, * * * and the Court not having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law to receive patent for his invention, as specified in his claim or any part thereof, as the facts may appear and such adjudication if it be in favor of the right of applicant shall authorize the Commissioner to issue such patent on applicant's filing in the Patent Office a copy of the adjudication, and otherwise comply with the requirements of law * * *."

Title 15, §89, United States Code, makes the proceedings described in the immediately foregoing quoted section applicable to registrations of trade-marks so far as pertinent, it reads:

> "89. Appeal from decision of Commissioner of Patents.—If an applicant for registration of a trademark * * * is dissatisfied with the decision of the Commissioner of Patents [not having appealed to the United States Court of Customs and Patent Ap-

peals, he may] on complying with the condition required in case of an appeal from the decision of the Commissioner of Patents by an applicant for patent, * * * and the same rules of practice shall govern in every state of the proceedings, so far as the same may be applicable (Feb. 20, 1905, c. 592, §9, 33 Stat. 727)."

There has been no question whatever in any of the proceedings as to the right of your petitioner to have recourse to the United States District Court by bill in equity under the circumstances of this case.